

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Children and Families Committee

BILL: CS/CS/SB 472

INTRODUCER: Children and Families Committee, Judiciary Committee and Senator Saunders

SUBJECT: Guardianship

DATE: March 13, 2006

REVISED: 03/28/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Sanford</u>	<u>Whiddon</u>	<u>CF</u>	<u>Fav/CS</u>
3.	<u></u>	<u></u>	<u>JA</u>	<u></u>
4.	<u></u>	<u></u>	<u></u>	<u></u>
5.	<u></u>	<u></u>	<u></u>	<u></u>
6.	<u></u>	<u></u>	<u></u>	<u></u>

I. Summary:

This bill makes numerous changes to guardianship law. These changes:

- Permit the suspension or revocation of a professional guardian's registration;
- Revise the law permitting a court to appoint a guardian ad litem to represent a minor's interest in a legal claim;
- Require emergency temporary guardians to file reports;
- Expand the rights of an incapacitated person to include services and rehabilitation necessary to maximize quality of life;
- Provide that an incapacitated person's right to marry is subject to court approval if an incapacitated person's right to contract has been removed;
- Require training for guardians, examining committee members, and court appointed guardianship attorneys;
- Require each member of an examining committee to report their findings;
- Require reports of voluntary guardians and notices to terminate a voluntary guardianship to include a certification from a physician that a ward is competent;
- Require professional and public guardians or their staff to visit their wards quarterly;
- Create separate requirements for guardianship plans for adults and minors;
- Authorize guardians to amend revocable trusts;
- Provide courts with continuing jurisdiction over trusts created or amended by a guardian and provides court with personal jurisdiction over their trustees;
- Permit the appointment of a surrogate guardian to take the place of a guardian for up to 30 days; and
- Make numerous technical changes.

This bill is based largely on the recommendations of the Guardianship Task Force created by the Legislature in 2003.

This bill substantially amends the following sections of the Florida Statutes: 744.102, 744.1083, 744.301, 744.3031, 744.304, 744.3115, 744.3145, 744.3215, 744.331, 744.341, 744.361, 744.365, 744.367, 744.3675, 744.3678, 744.3679, 744.368, 744.441, 744.464, 744.474, 744.511, 744.527, 744.528, 744.708, 765.101, 121.091, 121.4501, 709.08, and 744.1085. This bill creates sections 744.3025 and 744.442, Florida Statutes. This bill also reenacts section 117.107, Florida Statutes.

II. Present Situation:

Guardianship

A guardian is a surrogate decision-maker appointed by the court to make personal and/or financial decisions for a minor or for an adult with mental or physical disabilities. After adjudication, the subject of the guardianship is termed a “ward.”

Florida law requires the court to appoint a guardian for minors in circumstances where the parents die or become incapacitated or if a child receives an inheritance or proceeds of a lawsuit or insurance policy exceeding the amount allowed by statute.

Adult guardianship is the process by which the court finds an individual’s ability to make decisions so impaired that the court gives the right to make decisions to another person. Guardianship is only warranted when no less restrictive alternative – such as durable power of attorney, trust, health care surrogate or proxy, or other form of pre-need directive – is found by the court to be appropriate and available.

Florida law allows both voluntary and involuntary guardianships. A voluntary guardianship may be established for an adult who, though mentally competent, is incapable of managing his or her own estate and who voluntarily petitions for the appointment.

Legislative intent establishes that the least restrictive form of guardianship is desirable. Accordingly, Florida law provides for limited as well as plenary adult guardianship. A limited guardianship is appropriate if the court finds the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property and if the individual does not have pre-planned, written instructions for all aspects of his or her life. A plenary guardian is a person appointed by the court to exercise all delegable legal rights and powers of the adult ward after the court makes a finding of incapacity. Wards in plenary guardianships are, by definition, unable to care for themselves.

Whether one is dealing with a minor whose assets must be managed by another or an adult with a disability who is not capable of making decisions for him/herself, when the court removes an individual’s rights to order his or her own affairs there is an accompanying duty to protect the individual. One of the court’s duties is to appoint a guardian. All adult and minor guardianships are subject to court oversight.

The legal authority for guardianship in Florida is found in Chapter 744, F.S. The court rules that control the relationships among the court, the ward, the guardian, and the attorney are found in Part III, Probate Rules, Florida Rules of Court. Together, these statutes and rules describe the duties and obligations of guardians and attorneys, as well as the court, to ensure that they act in the best interests of the ward, minor, or person who is alleged incapacitated.¹

Guardianship Task Force

In 2003, the Legislature created the Guardianship Task Force within the Department of Elderly Affairs.² The responsibilities of the task force were to “identify guardianship best practices and recommend specific statutory and other changes for achieving such best practices and for achieving citizen access to quality guardianship services.”³ The task force issued its recommendations for statutory changes in *Guardianship Task Force: Final Report 2004*.⁴

III. Effect of Proposed Changes:

This bill makes numerous changes to guardianship law. Most of the changes are based on recommendations of the Guardianship Task Force. The substantive changes made by the bill are discussed below.

Guardian Registration (Section 2)

Under existing s. 744.1083, F.S., professional guardians must be registered with the Statewide Public Guardianship Office (SPGO). The executive director of the SPGO may deny registration to those who are not authorized to be guardians. The executive director, however, has no expressed statutory authority to suspend or revoke the registration. The bill gives the executive director the authority to suspend or revoke the registration of a guardian for violations of Chapter 744, F.S. The bill further requires that notice of the suspension or revocation be sent to the chief judges of the circuit courts in which the guardian was serving.

Claims of Minors (Sections 3 & 4)

Under existing law, courts have the discretion to appoint a guardian ad litem to represent a minor's interests in claims exceeding \$15,000 involving personal injury, property damage, or wrongful death. The court is required to appoint a guardian ad litem when these claims equal or exceed \$25,000. Appointment of a guardian ad litem is discretionary if a legal guardian has been appointed and has no adverse interests to the minor.

Under the bill, court discretion to appoint a guardian ad litem is not limited by the type of claim. Additionally, the threshold at which a court is required to appoint a guardian ad litem is increased to \$50,000 from \$25,000. However, the appointment remains discretionary if a legal guardian has been appointed and has no adverse interests to the minor.

¹ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Wards* 5 (2003) at <http://www.floridasupremecourt.org/>.

² Section 4, ch. 2003-262, L.O.F.

³ *Id.*

⁴ The report of the Guardianship Task Force is available at <http://elderaffairs.state.fl.us>.

Emergency Temporary Guardianships (Section 5)

Existing law authorizes courts to appoint emergency temporary guardians for 60 days. The appointment may be extended an additional 30 days. Under the bill, emergency temporary guardians may be appointed for 90 days, and the appointment may be extended an additional 90 days.

Existing law provides that the duties of an emergency temporary guardian are those specified in the court order appointing the guardian. The bill requires the emergency temporary guardian to report on the property of the ward. If the emergency temporary guardian is also a guardian of a person, the report must discuss the ward's health and living conditions.

Standby Guardianship (Section 6)

A standby guardian may be appointed by a court to be ready to take over the responsibilities of another guardian upon his or her death or incapacity. Existing law does not expressly require that interested parties be notified of petitions to appoint a standby guardian. The bill requires that notices of these petitions be served on an existing guardian, the ward's parents, or the ward's next of kin. The bill also provides that a standby guardian "shall submit to a credit and criminal investigation as set forth in s. 744.3135." Under s. 744.3135, F.S., the court may order investigations of nonprofessional guardians and must require investigations of professional and public guardians.

Guardian Education (Section 8)

Under existing law, a guardian is required to have several hours of guardianship training within a year of an appointment as a guardian. Under the bill, guardianship training must be completed within four months of the appointment.

Rights of Incapacitated Persons (Section 9)

Under existing law, incapacitated persons have a number of rights including the right to receive necessary services and rehabilitation. The bill expands on that right by providing that a person has the right to services and rehabilitation to maximize the quality of life.

Under existing law, when a person is determined by a court to be incapacitated, the court may remove some of the person's rights. These rights include the right to marry and the right to contract. The bill provides that if the right to contract is removed, the right to marry is subject to court approval.

Procedures to Determine Incapacity (Section 10)

Existing law provides that the court must appoint an attorney for an alleged incapacitated person. The bill provides that the attorney appointed by the court must be an attorney on a registry compiled by an Article V indigent services committee. The bill also requires court appointed guardianship attorneys to have eight hours guardianship education or three years of experience in guardianship matters.

Under existing law, members of an examining committee may not be related to or associated with one another, the person filing a petition alleging incapacity, or the alleged incapacitated person. The bill further provides that the examining committee members may not be related to or associated with counsel for the petitioner or the proposed guardian. Additionally, the bill

prohibits members of the examining committee from serving as a guardian for the person whose capacity was examined by the committee. Lastly, the bill requires examining committee members to have initial training and continuing education on guardianship matters.

Existing law requires an examining committee to submit a report of its findings to the court. The bill requires that each member submit his or her own report. Existing law requires examining committees to document their findings. The bill further requires examining committees to document the names of persons present during examinations and the names of persons responding to questions posed to an alleged incapacitated person. The bill also requires members of an examining committee to record the date and time that he or she conducted his or her examination.

Existing law permits the costs of a proceeding to determine capacity to be charged against a person who files in bad faith a petition alleging a person is incapacitated. The bill permits attorney's fees, in addition to costs, to be charged against a person who filed a petition in bad faith.

Voluntary Guardianship (Section 11)

Existing law requires guardians to file annual reports. The bill requires the reports of a guardian in a voluntary guardianship to include a certification from a physician that a ward is competent. Existing law also permits wards to terminate a voluntary guardianship by filing a notice with the court. The bill requires the ward to file a physician's certification that the ward is competent along with the notice to terminate a voluntary guardianship. The bill does not discuss what happens when a physician finds a ward to be incompetent.

Powers and Duties of Guardian (Sections 12 & 26)

The bill adds to the duties of guardians to require the guardian or the guardian's staff to personally visit their wards quarterly. During the visit, the needs of the ward must be evaluated.

Inventory of a Ward's Property (Section 13)

Under existing law, a guardian must make an inventory of specific items of a ward's property. The bill adds trusts of which the ward is a beneficiary to the items that must be included in the property inventory.

Guardianship Plan (Section 15)

Under existing law, a guardian must file an annual guardianship plan that describes how the ward's needs will be met. The bill establishes separate requirements for guardianship plans for guardianships for adults and minors.

Audits of Guardianship Accounts (Sections 16 & 17)

Existing law requires guardians to keep cancelled checks. However, banks are no longer required to keep cancelled checks.⁵ Instead of cancelled checks, the bill requires guardians to keep other evidence of payment.

⁵ *Guardianship Task Force: Final Report 2004* at 20.

Under existing law court clerks are required to audit the more complex guardianship accounts. Existing law expressly states that clerks have no responsibility to monitor or audit accounts that are placed with a bank, trust, or savings and loan association. Under the bill, clerks have the authority to monitor the accounts at a bank, trust, or savings and loan association.

Trusts (Section 19)

Under existing s. 744.441(19), F.S., a guardian may create revocable trusts. The bill authorizes a guardian to amend revocable trusts.

Surrogate Guardians (Section 20)

The bill authorizes guardians to petition a court to designate a surrogate guardian. Under the bill, a surrogate guardian can take the place of the guardian for up to 30 days.

Restoration of Capacity (Section 21)

Existing law prohibits a person from seeking to restore his or her capacity in the 90-day period after he or she was found to be incapacitated. The bill repeals this prohibition. As a result, a person may seek to file a suggestion of capacity at any time. The bill also repeals a requirement for the state attorney to be notified when a person seeks to reestablish capacity.

Removal of Guardian (Section 22)

Existing law provides numerous grounds relating to misconduct to remove a guardian. In addition, the bill provides that a guardian may be removed upon a showing that it is in the best interests of the ward to do so. The bill further creates a rebuttable presumption that a guardian who is a relative of the ward acts in the best interests of the ward. This rebuttable presumption was not among the recommendations of the Guardianship Task Force. Whether the rebuttable presumption will make it harder to remove a relative guardian is unclear.

Final Reports (Section 24)

The bill provides that the guardian of a deceased ward must file a final guardianship report within 45 days after service with letters of administration or curatorship.⁶

Effective Date (Section 33)

The bill takes effect on July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁶ The term “curatorship” means the “office of curator or guardian.” BLACK’S LAW DICTIONARY (8th ed. 2004).

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons involved in guardianship will be required to have additional training. These persons may also have to spend more time drafting reports regarding a person's capacity. The cost of these reports may be borne by the ward. Additionally, guardians may have to visit their wards more frequently.

C. Government Sector Impact:

The public guardians may have to visit their wards more frequently and may have additional requirements to file reports with the court.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
